2006

State of Utah v. Donald Millard : Brief of Appellant

Utah Court of Appeals

Kris K. Leonard; assistant attorney general; Mark L. Shurtleff; attorney general; attorneys for appellee.
David Drake; attorney for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee, vs. DONALD MILLARD, Appellant.	)	**CASE NO. 20060336 CA**

ADDENDA TO OPENING BRIEF OF APPELLANT

APPEAL FROM THIRD DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH
JUDGE RANDALL SKANCHY

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ATTORNEYS FOR APPELLEE

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	**CASE NO. 20060336 CA**
	)	
Appellee,	)	
	)	
vs.	)	
	)	
DONALD MILLARD,	)	
	)	
Appellant.	)	

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ATTORNEYS FOR APPELLEE

ADDENDA TABLE OF CONTENTS

ADDENDUM I

ADDENDUM I

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IN THE THIRD JUDICIAL DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. DONALD MILLARD, Defendant.	RULE 23B: FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 041300401 App. Case No. 20060336–CA JUDGE MARK S. KOURIS

Pursuant to Rule 23B, Utah Rules of Appellate Procedure, the Utah Court of Appeals remanded this case for an evidentiary hearing on the following claims of ineffective assistance of counsel:

1. The defense team's alleged failure to notify defendant of his constitutional right to testify and the fact that only he could waive that right;

2. The defense team's failure to present the testimony of defendant, Diane Martin, Glenda Millard, and Melody Oliver relating to claims of bias and potentially exonerating conversations concerning

–the defense team's failure to present testimony from Davey Desvari and Bill Penrod at trial;
–the defense team's failure to call a methamphetamine expert at trial;

–the defense team's failure to challenge the nature of the victim's injuries; and
–the defense team's failure to subpoena records from the Office of Recovery Services regarding defendant's unpaid past child support.

In compliance with that order, an evidentiary hearing was conducted on October 2, 2008. At the hearing, defendant Donald Millard was represented by his counsel, Mr. David O. Drake and Mr. Peter W. Guyon. The State was represented by Mr. Gary K. Searle and Mr. Douglas Hogan, from the Tooele County Attorney's Office.

At the hearing, defendant Millard waived his attorney/client privilege with respect to his trial counsel as to his claims of ineffective assistance of counsel. The Court then heard testimony from defendant and from defendant's trial counsel Mr. Walter Bugden and Ms. Tara Isaacson ["defense team"]. In addition, exhibits were admitted, including the affidavits of defendant, Glenda Millard, Melody Oliver, and Diane Martin.

The Court notes that pursuant to Utah Rule of Appellate Procedure 23B(e), the burden of proving a fact is upon the proponent of the fact. The standard of proof is a preponderance of the evidence.

Prior to the evidentiary hearing, the defense submitted a written memoranda summarizing its view of the facts and the law concerning the issues. The defense also filed proposed findings of facts and conclusions of law. Following the hearing, the defense was permitted to supplement the hearing

record with an exhibit. Based on the testimony, evidence, and memoranda, the Court now enters the following factual findings:

THE EXPERIENCE AND CREDIBILITY OF THE DEFENSE TEAM

Walter Bugden:

1. Mr. Walter Bugden has practiced law in the Utah legal community for 31 years.

2. Mr. Bugden has completed 216 criminal trials, of which 81 were felonies.

3. In the 5 years preceding the trial in this matter, Mr. Bugden competed 26 trials and received 23 not guilty verdicts.

4. In 2006, Mr. Bugden was counted as one of a select group of attorneys that were inducted into the American College of Trial Lawyers.

5. While testifying in this matter, Mr. Budgen's testimony was completely corroborated by other trial testimony and evidence and was fully corroborated by Ms. Isaacson's testimony.

6. The content of Mr. Bugden's testimony, along with his demeanor, temperament and actions while testifying on the stand, causes this Court to conclude that Mr. Bugden was a completely credible witness.

Tara Isaacson:

7. Ms. Tara Isaacson has practiced law in the Utah legal community for 12 years.

8. Ms. Isaacson has completed 38 jury trials either by herself or as co-counsel with Mr. Bugden.

9. While testifying in this matter, Ms. Isaacson's testimony was completely corroborated by other trial testimony and evidence and was fully corroborated by Mr. Bugden's testimony.

10. The content of Ms. Isaacson's testimony, along with her demeanor, temperament and actions while testifying on the stand, causes this Court to conclude that Ms. Isaacson was a completely credible witness.

DEFENDANT'S KNOWLEDGE OF HIS RIGHT TO TESTIFY AND HIS ABILITY TO WAIVE THAT RIGHT

11. Prior to trial, the defense team carefully prepared the defendant to testify at trial.

12. The team conducted multiple mock trials where the defendant was repeatedly subjected to trial examinations (R at 16: 14-16). Knowing the lead prosecutor was a good cross-examiner, Mr. Bugden personally subjected the defendant to rigorous cross-examination to prepare him for trial (R. at 19: 5-9).

13. The defendant was set to testify at his trial on Wednesday, December 14, 2005. However, on Tuesday, surprise testimony changed this plan. The State's witness, Don Brinkerhoff, testified that after he attempted to kill the victim, he spoke with the defendant via telephone. Phone records corroborated this claim (R. at 22: 13-20).

14. That evening, the defendant attended a meeting at the defense team's office. The defense team explained to the defendant that this surprise phone call was a "smoking gun" and must be explained to the jury (R. at 22: 23-24).

15. The defense team observed that the defendant looked "like a deer in headlights" and had no response. Defendant then asked the team to allow him to think about it overnight (R. at 23: 6-9).

16. The next morning, the defendant explained to his counsel for the first time that, prior to his interview with the police on the night of the attack on the victim, the defendant went to his apartment to unload his luggage from his truck. Davey Desvari met him at the apartment, and defendant handed his phone to Mr. Desvari. The communication with Mr. Brinkerhoff then went to Mr. Desvari and not to the defendant (R. at 23: 10-18).

17. The defense team found this explanation to be completely unbelievable and inconsistent with the defendant's prior rendition of facts (R. at 23: 19-22).

18. The defense team also was concerned that this testimony would be perjurious and that the jury would find it unbelievable (R. at 23: 24-25; 24: 1-3). They explained to the defendant that this explanation was inherently unbelievable, and they recommended that he not testify (R. at 24: 6-9).

19. The defense team concedes that they did not have the defendant execute a formal waiver of his right to testify at his trial (R. at 27: 1-6). Neither did the defense team use the term "constitutional right" when informing him of his right to testify (R. at 26: 4-7).

20. However, the defense team insists that on dozens of occasions, they unequivocally informed the defendant of his right to testify (R. at 126: 16-19; 134: 21-24). Additionally, they never told the defendant he was not going to testify (R. at 134: 25; 135: 1-3).

21. Additionally, the defense team sent a letter to the defendant prior to trial, dated 2 December 2005, stating, "At this point, we are recommending that you testify. It is ultimately your decision." State's Exhibit 21.

22. The defendant's version of facts as to this point is markedly different. The defendant agrees that the defense team met with him at their office on Tuesday night during the trial. The defense explained to him the gravity of Mr. Brinkerhoff's testimony and the corroborating phone records. Defendant claims he then retreated to his truck and returned with his zippered black book (R. at 215: 13-16).

23. The defendant testified that he looked through the book for the date in question. He testified that his notes indicated that Davey Desvari met him at his apartment after defendant returned from his trip on the night of the attack. As the defendant unloaded his truck, Mr. Desvari used defendant's phone. While Mr. Desvari was still on the phone, the defendant retrieved another load from the truck and brought it to his apartment (R. at 215: 17-24).

24. Mr. Desvari was at the defendant's apartment because Mr. Desvari had recently been released from jail and wanted to see the defendant about a construction project they were working on together (R. at 216: 9-14).

25. The defendant testified that he explained this to Ms. Isaacson and showed her the journal entry. Ms. Isaacson looked at it for a brief moment and told the defendant that she didn't believe it to be true and was sure that there was no way "in hell" the jury would believe it (R. at 218: 22-24).

26. The defendant then testified that Ms. Isaacson told him that since they could not explain the phone call or what it meant, the defendant was not going to testify. He claimed that she stated, "That's all there is to it. You will not testify" before she ushered him out of the office (R. at 219: 1-4, 6-7).

27. The following day at trial, the defendant did not testify. He now claims that the defense team did not apprise him of his right to testify or his right to do so over their objections and, further, that they told him in no uncertain terms that he would not be allowed to testify.

28. However, a number of factors bear adversely on defendant's credibility with respect to this claim.

29. The night of the attack on the victim, Susan Hyatt, the defendant participated in a taped interview with the police. The defendant's cell phone rang during the interview, and he answered the call. The interview transcript reveals that the defendant told the person on the phone, "I'm trying to get home. I haven't even made it to my place yet. Just my parents. I got all the luggage in the back of my truck." Interview Transcript at 25. Yet in the defendant's latest affidavit and in his hearing testimony, he claims he went to his apartment and unloaded the luggage prior to the police interview.

30. This factual change appears to be the vehicle by which the defendant places his cell phone in Mr. Desvari's hand prior to the damning call with Mr. Brinkerhoff.

31. At the hearing, when the State pressed the defendant on this inconsistency, the defendant indicated that he was lying to the person on the other end of the phone, but was telling the truth at the hearing. The defendant provided no motive to lie about his trip to the apartment while on the phone, but he has a clear motive to lie in this proceeding.

32. It is also difficult to believe that the defendant would record in his written journal a momentary handing off of his phone to a friend.

33. Additionally, the defendant's affidavit is riddled with numerous inconsistencies and contradictions when compared with the hearing testimony and the trial transcript. For example, his affidavit states that the only direct evidence of the defendant's $20,000 debt to the victim was the victim's testimony at trial. Affidavit of Donald Millard at 5. The affidavit also states that this $20,000 is "very inflated." *Id.* at 6.

34. In contrast, the defense team testified at the hearing that prior to trial they obtained a copy of a court judgment that had been entered against the defendant for $20,000 based on his child support payment arrearages.

35. All disputed issues testified to by the defendant lack corroboration.

36. The content of the defendant's testimony and affidavit, together with a very careful examination of his demeanor, temperament and actions while on the

stand, causes this Court to conclude that the defendant was not a credible witness.

37. This Court finds very credible evidence, and therefore concludes, that the defense team, on several occasions, orally and in writing, informed the defendant of both his right to testify and his right to make the final decision on the matter.

38. Further, based upon an unexpected trial development, the defense team made a reasonable tactical decision and recommended that the defendant not testify. The defendant chose to follow this advice.

FAILURE TO CALL DIANA MARTIN AS A TRIAL WITNESS

39. Defendant challenged the defense team's decision not to call Ms. Diana Martin to testify at the trial.

40. The defense team interviewed Ms. Martin prior to trial. During their discussions with her, she provided only positive character evidence for the defendant. She provided no exculpatory evidence prior to the trial (R. at 102: 14-20).

41. The defense team's investigation of Ms. Martin was reasonable and was sufficient to support their tactical decision not to call her to testify at trial.

42. That decision was a reasonable one under the circumstances.

FAILURE TO CALL GLENDA MILLARD AS A TRIAL WITNESS

43. Defendant challenged the defense team's decision not to call Ms. Glenda Millard to testify at the trial.

44. The defense team interviewed Ms. Millard prior to trial. During their discussions with her, Ms. Millard made no mention of knowing of or participating in any phone calls that took place on the evening of the attempted murder (R. at 178: 9-19).

45. The defense team knew about the alleged meeting in the park between Don Millard, Ben Desvari, Glenda Millard and Duane Millard. (R. at 115: 2-20).

47. The defense team did not use the alleged park meeting at trial as the defense team believed it to be self-serving and completely unbelievable (R. at 115: 2-20).

48. The defense team's investigation of Mrs. Millard was reasonable and was sufficient to support their determination that her testimony was of little or no value in the trial.

49. Consequently, they made a reasonable tactical decision not to call her to testify.

FAILURE TO CALL MELODY OLIVER AS A TRIAL WITNESS

50. Defendant challenged the defense team's decision not to call Ms. Melody Oliver to testify at the trial.

51. The defense team interviewed Ms. Oliver prior to trial. The defendant and Ms. Oliver were very close friends.

52. During some of their discussions, Ms. Oliver would claim that her boyfriend, State's witness Ted Anthony, was jealous of the relationship between Ms. Oliver and the defendant. She also explained that Mr. Anthony believed the

defendant and Ms. Oliver were engaged in a sexual relationship (R. at 119: 16-21).

53. The defense team believed that they could put Mr. Anthony's credibility at issue in the trial by implying that he was motivated by jealousy to testify against the defendant.

54. However, the defense team also learned that the defendant gave Ms. Oliver rides to her probation visits and that he paid for her required urinalysis tests (R. at 64: 14-20; 131: 6-9). The defense team was concerned that this activity could lead the jury to believe that Ms. Oliver's testimony was bought and paid for by the defense, thus eliminating any credibility she may have had (R. at 64: 8).

55. Additionally, as trial approached, Ms. Oliver began to refuse to attend defense team meetings and stopped answering or returning their phone calls (R. at 64: 24-25; 65: 1).

56. Finally, after ceasing all communication with the defense investigator, Ms. Oliver demanded payment to meet with the defense team at their office (R. at 131: 9-14).

57. As a tactical consideration, the defense team's practice is to not call a witness to the stand at trial unless they are convinced that the witness will not damage their case. The defense team believed Ms. Oliver to be a "wild card" and chose not to call her as a witness because they were unsure of her impact on their case (R. at 131: 15-22).

58. The defense team's decision not to call Ms. Oliver to the stand was a reasonable tactical decision under the circumstances.

FAILURE TO CALL DAVEY DESVARI AS A TRIAL WITNESS

59. Defendant also challenged the defense team's failure to call Mr. Davey Desvari to testify at the trial.

60. After having several conversations with defendant, the defense team *determined that he had not provided any information that suggested that* Mr. Desvari would be an essential or helpful witness at trial (R. at 39: 15-20; 40: 1-6; 121: 25; 122: 1-8; 139: 12-13).

61. All of the investigation they conducted concerning Mr. Desvari indicated that he was involved in criminal behavior and possessed no exculpatory information (R. at 122: 9-16).

62. Further, the defendant described going to Mr. Desvari's house and discovering that is was filled with stolen property and guns (R. at 57:23-25).

63. The defense team's investigation was sufficiently thorough to support their reasonable tactical decision not to call Mr. Desvari as a witness because it would establish that the defendant associated with individuals who had ties to the *underworld and might damage defendant's credibility with the jury* (R. at 58: 1-16).

FAILURE TO CALL BILL PENROD AS A TRIAL WITNESS

64. Defendant also challenged the defense team's decision not to call Mr. Bill Penrod to testify at the trial.

65. Mr. Penrod was said to have committed crimes with Ted Anthony, one of the State's witnesses. Mr. Penrod's testimony about that association might damage Mr. Anthony's credibility, to the benefit of the defense (R. at 120: 6-12).

66. The defense team interviewed Mr. Penrod and learned that he suffered from a bi-polar disorder and was a member of the Third District Court's mental health program.

67. Further, during some of the defense team interviews, Mr. Penrod would be completely lucid and coherent, while in other interviews, he would be suffering from his mental condition and would be unaware of his surroundings and completely confused (R. at 120: 13-21).

68. Based on its investigation, the defense team made a reasonable tactical decision not to call Mr. Penrod to testify because the risk that he would damage their case with unanticipated testimony outweighed any benefit his testimony could provide (R. at 120: 22-25; 121:1).

FAILURE TO USE A METHAMPHETAMINE EXPERT AT TRIAL

69. Prior to trial, the defense team retained the services of Dr. Kathey Verdeal, who is a methamphetamine expert.

70. The defense team hired Dr. Verdeal in hopes that she would be able to testify that the use of methamphetamine by a number of the State's witnesses would adversely affect their memories and perception of the facts at issue, thereby placing their credibility at issue (R. at 117: 3-9).

71. However, Dr. Verdeal informed the defense team that methamphetamine use does not make you more unreliable, unbelievable or incredible (R. at 117: 10-17). Further, Dr. Verdeal revealed that, if properly examined, she would testify that methamphetamine might cause the opposite result and enhance the adverse witnesses' memories (R. at 118: 2-5).

72. After thoroughly investigating this issue, the defense team made a reasonable tactical decision to use Dr. Verdeal to assist them in preparing for cross-examination and to provide a resource of useful knowledge, but not to call her to testify at trial (R. at 117: 20-25).

FAILURE TO CHALLENGE THE NATURE OF THE VICTIM'S INJURIES

73. Defendant challenged the defense team's failure to employ a medical professional or to subpoena Susan Hyatt's medical records to establish that her injuries may have been self-inflicted (R. at 136: 1-9).

74. The defense team characterized this suggested strategy as "ridiculous" and believed that it would have offended the jury and damaged the defense team's credibility (R. at 67: 17-18; 137: 13-22).

75. The defense team also found no similar claim or corroboration for this assertion from State's witnesses who would have greatly benefitted if the injuries were proved to be self-inflicted (R. at 136: 11-17).

76. Drawing upon their experience in defending numerous cases involving physically injured victims, the defense team made a reasonable tactical decision

to characterize and treat Ms. Hyatt as a brave heroine who was lucky to be alive (R. at 135: 23-25; 136: 1).

FAILURE TO SUBPOENA RECORDS FROM THE OFFICE OF RECOVERY SERVICES

77. Another claim at the hearing was that the defense team failed to subpoena records from the Office of Recovery Services ["ORS"] to establish the amount of defendant's unpaid past child support.

78. During trial preparation, the defendant told the defense team that his past child support payments were years, not months, past due (R. at 73: 20-24; 97: 6-13; 99: 7).

79. In addition, the defense team contacted the defendant's divorce attorney and obtained a copy of a $20,000 court judgment that had been entered against the defendant for his child support arrearages (R. at 73: 13-14; 96: 22-25; 97: 1-2).

80. Because of the defendant's admissions and the court judgment, there was no potential tactical benefit to be achieved by subpoenaing the ORS records.

RULE 23B(e) FINDINGS ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

1. With the exception of informing the defendant of his right to testify, all of the challenged decisions involved in this hearing were tactical decisions made by the defense team.

2. Without exception, all of the issues were thoroughly investigated by the experienced defense team, and this Court finds a reasonable basis for all of the tactical decisions they made.

3. Based on the evidence and the above findings of fact, the Court finds that the defense team did not perform deficiently in any of the challenged areas.

4. There is no reasonable probability that a change in any or all of the tactical decisions made by the defense team might have resulted in a different outcome.

5. The defense team's trial preparation and performance did not fall below an objective standard of reasonable professional judgment but instead significantly exceeded that standard.

6. In no way did the defense team's performance or strategic and tactical decisions prejudice the defendant.

7. The defendant's constitutional right to testify at his own trial was not violated. The defense team made it clear to him that he had that right and could exercise it. Ultimately, based upon the defense team's recommendation, the defendant chose not to testify.

RULE 22B(e) FINDING OF GOOD CAUSE FOR REASONABLE DELAY

8. The court recognizes that the remand proceedings were not completed within the ninety days provided by rule 23B(e), Utah Rules of Appellate Procedure.

9. Pursuant to the rule, the court finds the delay beyond the ninety-day period to be reasonable.

10. The court further finds the delay to be justified by good cause due to the recusal of Judge Stephen L. Henriod and the need to reassign the matter to a new judge, scheduling difficulties, the need to accommodate a one-day evidentiary hearing, and the time required to obtain a hearing transcript before preparation of the written findings required under the rule.

DATED this 10 day of February, 2009.

Judge Mark S. Kouris
Presiding Third District Court Judge

Approved as to form:

Gary K. Searle
Douglas Hogan
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2009, I served a copy of the foregoing [proposed] **RULE 23B: FINDINGS OF FACT AND CONCLUSIONS OF LAW**, by causing the same to be mailed, via first class mail, postage prepaid, to the following:

Mr. David O. Drake (#0911)
6905 South 1300 East #248
Midvale, Utah 84047

Mr. Peter W. Guyon (#1285)
614 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

Counsel for defendant/appellant Millard

ADDENDUM 2

ADDENDUM 2

77-1-6. Rights of defendant.

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or b entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

ADDENDUM 3

ADDENDUM 3

Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before fina judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

ADDENDUM 4

ADDENDUM 4

United States Constitution

United States Constitution
AMENDMENTS

Amendment VI. Rights of the accused.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and caused of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, an to have the assistance of counsel for his defense.

United States Constitution

United States Constitution
AMENDMENTS
Amendment XIV.

§ 1. Citizenship — Due process of law — Equal protection.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

ADDENDUM 5

ADDENDUM 5

Prosecutor: DOUGLAS HOGAN
Defendant
Defendant's Attorney(s): PETER W GUYON

Audio
Tape Count: 3:03

HEARING

COUNT: 3:03
The Judge reads finding of fact into the record regarding defendants attorneys, witnesses, and defendant testifying
The court orders the state to prepare an order and submit it to the court and defense counsel no later than 2 weeks from today
The court will file final copy of the order on January 9, 2009

-29-08 Fee Account created Total Due: 2.50
ffania
-29-08 COPY FEE Payment Received: 2.50
ffania
-06-09 Filed order: Rule 23B: Findings of Fact and Conclusions of Law
ınifej
Judge MARK KOURIS
Signed February 20, 2009

ADDENDUM 6

ADDENDUM 6

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 3, 2009 a true and correct copy of the foregoing Addenda to Opening Brief was mailed, first class postage prepaid, or by expedited mail, or by hand-delivery to opposing counsel on August 4, 2009 to the following counsel of record:

Kris Leonard, Assistant Attorney General
160 East 300 South, Suite 600
P.O. Box 140854
Salt Lake City, UT 84114-0854
(Fax: 801/366-0167)

And an original and 7 copies mailed on August 3, 2009 to the:

Utah Court of Appeals
450 South State Street, 5th Floor
Salt Lake City, UT 84111
(Fax: 801/578-3999)

By: /David Drake/